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No. 05-755

IN THE SUPREME COURT OF THE UNITED STATES

S.W. ORNOSKI, Acting Warden,
*Petitioner*,

- v. -

SANTOS L. REYES,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether any prisoner who has received a life sentence under California's Three Strikes law can ever be granted relief in federal habeas corpus on the ground that his sentence violates the Eighth Amendment's proscription on cruel and unusual punishment, in light of *Lockyer v. Andrade*, 538 U.S. 63 (2003).

2. The petition presents the question whether it violates the limitations of 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth Amendment challenge when he never attempted to develop those facts as part of such challenge in the state court. However, as we explain in this brief, that question is not in fact presented by this case.

## LIST OF PARTIES

The original parties in the district court and the Ninth Circuit were Santos L. Reyes and A. Calderon, then-Warden of San Quentin State Prison. At the time the initial unpublished opinion was filed in the Ninth Circuit, J.S. Woodford was substituted for A. Calderon, who had succeeded as Warden of San Quentin State Prison. At the time the final published decision was filed in the Ninth Circuit (the judgment being appealed from), Jill Brown was substituted for J.S. Woodford, her predecessor as Warden of San Quentin State Prison. S.W. Ornoski, Acting Warden of San Quentin State Prison, has been substituted for Ms. Brown as petitioner in this Court. Mr. Reyes is the respondent in this Court.

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I

There is no need for this Court to review the question whether in light of Lockyer v. Andrade, federal habeas corpus relief cannot be granted on cruel and unusual punishment grounds on any California three strikes sentence since (1) this Court in Andrade explicitly held that such relief *could* be granted in an "exceedingly rare" and "extreme" case, and the Ninth Circuit has not held otherwise, and (2) the Ninth Circuit has not granted habeas relief in the instant case, or even indicated that such relief should be granted, thus it would be premature for this Court to step in at this time. ..... 7

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There is no need for this Court to review the claim that it violates 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth Amendment claim when he never attempted to develop those facts as part of such a challenge in state court because (1) the claim is premised on an assumption that Mr. Reyes did not attempt to develop facts underlying his prior convictions in state court, but the record supports no such premise, (2) by remanding the case to the district court for additional fact development and to determine whether relief should be granted in the first instance, the Ninth Circuit has done nothing that violates any statute or conflicts with any precedent, and (3) the proper forum for the state to litigate this claim is in the district court, not this Court. ..... 18

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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**BRIEF FOR RESPONDENT IN OPPOSITION**

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Petitioner presents two questions it asks this Court to review. This Court should decline to review both. With respect to petitioner's first claim – that in light of Lockyer v. Andrade, federal habeas corpus relief cannot be granted on cruel and unusual punishment grounds on any California three strikes sentence – review should be denied because (1) this Court in Andrade explicitly held that such relief *could* be granted in an "exceedingly rare" and "extreme" case, and the Ninth Circuit has not held otherwise, and (2) the Ninth Circuit has not granted habeas relief in the instant case, or even indicated that such relief should be granted, and there is no need for this Court to step in at this time.

Petitioner's second claim – that it violates the limitations of 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth

Amendment claim when he never attempted to develop those facts as part of such a challenge in state court – need not be reviewed by this Court because the issue is simply not presented in this case. Petitioner's claim is premised on an assumption that Mr. Reyes did not attempt to develop facts underlying his prior convictions in state court and may not do so now. But the record supports no such premise. To the contrary, the record suggests that such fact development did occur in the state court and the state may have failed to provide the entire state record to the district court as part of the federal habeas proceedings. Either way, all the Ninth Circuit rather unremarkably has done in this case is to say it cannot properly review the Eighth Amendment claim raised by Mr. Reyes because the record before it is incomplete, and direct the district court "to develop the record further and to determine in the first instance whether Reyes is entitled to relief." (Pet. App. A13). Should the state have a legitimate argument for why Mr. Reyes should be precluded from adducing such evidence, it may raise it and litigate it before the district court. There is no reason for this Court to address a claim that may not exist.

Accordingly, because this Court does not sit to issue advisory opinions nor to engage in error correction, the petition for a writ of certiorari should be denied.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A1-A17) is reported at 399 F.3d 964 (9th Cir. 2005).

## JURISDICTION

The opinion and judgment of the court of appeals was filed on March 4, 2005. A petition for rehearing en banc was denied on October 12, 2005. This petition for a writ of certiorari was filed on December 7, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

Factual Background.

On September 18, 1997, Santos Reyes entered the Department of Motor Vehicles ("DMV") office on Waterman Avenue in San Bernardino, California. He filled out an application for a driver's license under the name of his cousin, Miguel Soto, who purportedly knew how to drive but not how to read. Mr. Reyes signed the application, which stated that the information was being provided under penalty of perjury. After Mr. Reyes signed the application, DMV employee Debra Alexander gave him two copies of the written driver's license test. Alexander suspected that Reyes was cheating on the exam by using a "crib sheet." She confiscated the two tests from Mr. Reyes and began filling out paperwork related to Reyes's alleged cheating. Meanwhile, Reyes left the DMV building. Alexander contacted California Highway Patrol Officer José Lopez, who was stationed at the DMV. Officer Lopez followed Mr. Reyes, who was walking away. After catching up with him, Officer Lopez patted-down Reyes and handcuffed him. Mr. Reyes cooperated with Officer Lopez and voluntarily admitted that he had attempted to take the written driver's license test for Soto. The encounter was without violence. (Pet. App. A4-A5).

State Court Proceedings.

On March 2, 1998, Mr. Reyes was arraigned in San Bernardino County Superior Court on an Amended Information, charging him with one count of perjury in violation of Cal. Penal Code § 118, for using his cousin's name on a DMV application.[1] Mr. Reyes was found to qualify for

[1]Rather than charging him with felony perjury, the state could have charged him with the more appropriate misdemeanor offense of violating Cal. Veh. Code § 20: using a false name or making a false statement on any document filed with the Department of Motor Vehicles. (Pet.

California's Three Strikes sentencing enhancement under Cal. Penal Code §§ 1170.12(a)-(d) and 667((b)-(i) because of two prior convictions: one as a juvenile in 1981 for residential burglary in violation of Cal. Penal Code § 459; and one in 1987 for a robbery with a weapon in violation of Cal. Penal Code § 211. (Pet. App. A5).

The State offered Mr. Reyes a deal of four years imprisonment in exchange for a guilty plea to the perjury charge, but Reyes rejected the plea deal and exercised his constitutional right to a jury trial.[2] On March 5, 1998, a jury convicted Mr. Reyes of the perjury charge and found the Three Strikes special allegations true. On April 2, 1998, the trial court refused Mr. Reyes's request to strike one of his prior strikes, and sentenced him to an indeterminate term of twenty-six years to life. (Pet. App. A5-A6).

Mr. Reyes appealed the judgment, claiming, among other things, that his sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment. On June 9, 1999, the California Court of Appeal affirmed Reyes's conviction and sentence. The court indicated that "[c]onsidered in isolation, a prison sentence of 26 years to life is clearly unwarranted for defendant's perjury offense. But the punishment was not merely for the present

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App. 8 n.4). The only reason for the charging decision appears to be the state's desire to seek a three strikes sentence. The Ninth Circuit correctly noted, though, that "[t]he fact that the California legislature deemed making false statements on a driver's license application to be a misdemeanor reflects that Reyes' offense 'is viewed' by society to be among the less serious offenses.'" (Id.) (quoting Solem v. Helm, 463 U.S. 277, 296 (1983)).

[2]In a pre-trial hearing, the trial court also indicated to Mr. Reyes that it had reviewed his attorney's motion to strike one of the priors, and although the court did not "normally commit or make a decision until after someone has been convicted," that were Reyes to go to trial and the priors were found to be true, that the court "would certainly consider striking the older prior, the '81 prior, for some legal reasons because of the age of the prior and other factors that your attorney and the district attorney have disclosed to me," and that "[t]he Court could put you then in prison for eight years." (Dist. Ct. Doc. 15, Exh. A at 4 [Tr. of 12/8/97]).

offense, but also for defendant's recidivist behavior." (Pet. App. J68). In assessing Mr. Reyes's federal Eighth Amendment claim, the court merely stated:

> The Eighth Amendment of the federal Constitution is violated when a sentence is "grossly disproportionate" to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) Under the federal Constitution, state statutes imposing enhanced terms for recidivist behavior have long been upheld. (*Rummel v. Estelle* (1980) 445 U.S. 263, 268.) Rare is the punishment that does not survive gross disproportionality analysis. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1193.) In this case, defendant has filed to show that his punishment is grossly disproportionate to his recidivist behavior, as demonstrated by his past and present offenses.

(Pet. App. J71). On September 1, 1999, the California Supreme Court denied Reyes's petition for review without explanation. (Pet. App. A6, B18).

Federal Habeas Corpus Proceedings.

On July 26, 2000, Mr. Reyes timely filed a 28 U.S.C. § 2254 habeas corpus petition in the United States District Court for the Central District of California. On September 21, 2000, Magistrate Judge Charles F. Eick issued a report and recommendation urging that Reyes's petition be dismissed with prejudice. On October 12, 2000, United States District Judge Virginia A. Phillips adopted the report and recommendation and dismissed Mr. Reyes's petition. The district court also denied his request for a certificate of appealability. (Pet. App. A6, E34-E35, F36, G37-G38, H39-H46).

Court of Appeals Proceedings.

On October 31, 2000, Reyes timely filed a notice of appeal and a request for certificate of appealability. On May 2, 2001, the United States Court of Appeals for the Ninth Circuit granted Reyes a certificate of appealability on the limited issue whether his Three Strikes sentence

violated the Eighth Amendment. (Pet. App. A6).

Although the Ninth Circuit initially affirmed the district court in an unpublished 2-1 decision, on rehearing, the court in a 2-1 published decision remanded the case to the district court for additional fact development on the circumstances surrounding Mr. Reyes's prior convictions and for the district court to determine in the first instance whether Mr. Reyes is entitled to relief. (Pet. App. A13).

The court first explained that in Ramirez v. Castro, 365 F.3d 755, 756, 770 (9th Cir, 2004), it previously held, relying on Lockyer v. Andrade, 538 U.S. 63, 72-73 (2003), that Eighth Amendment challenges to Three Strikes sentences remain viable in certain "exceedingly rare" cases. In Ramirez, the court applied the Supreme Court's analysis from Solem v. Helm, 463 U.S. 277 (1983), to examine as an initial matter whether the petitioner's extreme sentence is justified by the gravity of his most recent offense and criminal history. The court concluded in Ramirez that the petitioner's sentence did not match the gravity of the triggering offense, or of his prior offenses, and directed that habeas relief be granted.[3] (Pet. App. A7-A9).

Applying that circuit precedent to Mr. Reyes's case, the court concluded that Mr. Reyes's sentence also did not match the gravity of his triggering offense of falsifying a driver's license application which was nonviolent and not a crime targeted at another individual, especially since the California legislature has deemed making a false statement on a driver's license application to be a misdemeanor, and thus reflects that the offense is viewed by society as among the less

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[3]The California Attorney General did not seek review of the Ramirez decision in "the interest of justice," and called it an "exceedingly rare case." (Pet. App. 7 n.3 (citing Henry Weinstein, *Lockyer Gives Up Three-Strikes Case*, L.A. Times, Apr. 30, 2004, at B6, *available at* 2004 WL 55909787)).

serious offenses. (Pet. App. A8). The court concluded, however, that it did not have enough information about the circumstances surrounding Mr. Reyes's armed robbery conviction but that "[t]he paucity of detail in the record indicates that this offense may have been non-violent." (Pet. App. 9-10). Because it believed that "but for Reyes' armed robbery conviction, Reyes would appear to have a plausible case for relief," but the record before the court was insufficient for it to conduct a proper analysis, the court "remand[ed] for the district court to develop the record further and to determine in the first instance whether Reyes is entitled to relief." (Pet. App. A12-A13).

## ARGUMENT

### I

**There is no need for this Court to review the question whether in light of Lockyer v. Andrade, federal habeas corpus relief cannot be granted on cruel and unusual punishment grounds on any California three strikes sentence since (1) this Court in Andrade explicitly held that such relief *could* be granted in an "exceedingly rare" and "extreme" case, and the Ninth Circuit has not held otherwise, and (2) the Ninth Circuit has not granted habeas relief in the instant case, or even indicated that such relief should be granted, thus it would be premature for this Court to step in at this time.**

In Lockyer v. Andrade, 538 U.S. 63, 72 (2003), this Court expressly held that "one governing legal principle emerges as 'clearly established' under [28 U.S.C.] § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years." Thus, the Court explained that in that particular case, "the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme'

case." Id. at 73 (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment); Solem v. Helm, 463 U.S. 277, 290 (1983); Rummel v. Estelle, 445 U.S. 263, 272 (1980)). So, despite the state's protestations, it is simply not the case that this Court "implicit[ly]" held "that a federal habeas court cannot find a state court ruling upholding an Eighth Amendment challenge to a sentence properly imposed under California's Three Strikes law contrary to, or an unreasonable application of, this Court's clearly established precedent." (Pet. 8). The state has apparently read into Andrade something that it would like to be there, but isn't.

Plainly, in the "exceedingly rare" and "extreme" case, it remains the case that a sentence may be grossly disproportionate – and a state court's contrary conclusion may be an objectively unreasonable application of that clearly established law. Moreover, as this Court has explained, a state court decision is contrary to clearly established precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). Thus, were a case to involve a set of facts materially indistinguishable from this Court's decision in Solem v. Helm, for example, in which a sentence was found to be grossly disproportionate, a state court's decision otherwise could be set aside on habeas review under 28 U.S.C. § 2254(d)(1). Finally, what constitutes "clearly established law" under § 2254(d)(1) "is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Andrade, 538 U.S. at 72-73 (citing Williams, 529 U.S. at 405, 413; Bell v. Cone, 535 U.S. 685, 698 (2002)). Thus, although the state here argues that this Court's decision in Ewing v. California, 538 U.S. 11 (2003), "has little, if any, precedential value

regarding federal habeas corpus review of an Eighth Amendment challenge to a sentence under California's Three Strikes law," (Pet. 10), the Court's decision there is something state courts must consider since the time Ewing was issued – and any future decisions of the Court defining the contours of the gross disproportionality principle must similarly be considered.

Significantly, the state's primary argument for why this case warrants review by this Court – even though the Ninth Circuit has not granted habeas relief in this case and habeas relief may never be granted in this case – is its belief that "the Ninth Circuit's recent decisions confirm that the court continues to misunderstand the scope of federal habeas corpus review, and therefore needs additional guidance." (Pet. 5). It maintains that the Ninth Circuit has "failed to be guided by the criteria presented in this Court's most recent opinion concerning habeas review of Eighth Amendment challenges in California, (Pet. 11), and that the court's decision in the instant case foretells "inconsistent outcomes dependent on how different panels choose to parse facts." (Pet. 10). Indeed, it stresses that even though this Court in Andrade said an Eighth Amendment challenge to a three strikes sentence would be viable in only an exceedingly rare case, "in the two years since this Court issued the decision in Andrade, the Ninth Circuit has [already] identified three cases that it feels potentially qualify as exceedingly rare," the instant case, Ramirez v. Terhune, 128 Fed. Appx. 663 (2004), a case in which the state is simultaneously seeking a writ of certiorari (No. 05-736), and Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004). (Pet. 10). But the state's rhetoric is belied by reality. Its argument is misleading and fails to give the entire picture.

Contrary to the state's suggestion, the Ninth Circuit has in fact only found an Eighth Amendment violation in the "exceedingly rare" case, granting relief only ***once*** since this Court's

decision in Andrade. See Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004). Notably, the state did not seek review of Ramirez v. Castro, publicly stated it believed it was an "exceedingly rare case," and acknowledged that relief was appropriate there. (Pet. App. A7 at n.3 ("We note that the California Attorney General declined to seek further review of our decision in *Ramirez*, stating that he was acting 'in the interest of justice' and calling *Ramirez* an 'exceedingly rare case.'") (citing Henry Weinstein, *Lockyer Gives Up Three-Strikes Case*, L.A. Times, Apr. 30, 2004, at B6, *available at* 2004 WL 55909787)).

By contrast, in that same time period the Ninth Circuit, relying on Andrade, has consistently and repeatedly – indeed, at least eighty times – ***denied*** relief to a California three strikes prisoner raising an Eighth Amendment challenge to his or her life sentence, even where the petitioner had a minor triggering offense.[4] See Earle v. Runnels, No. 05-15739, 2006 WL 1049733 (9th Cir. Apr. 21, 2006) (unpublished) (receiving stolen property [a 16 year old motorcycle]); French v. Duncan, No. 04-57067, 2006 WL 679932 (9th Cir. Mar. 15, 2006) (unpublished) (shoplifting $31 worth of cigarettes); Aguirre v. Hubbard, 167 Fed. Appx. 668 (9th Cir. 2006) (possession of 0.1 gram of methamphetamine); Wallace v. Kramer, 149 Fed. Appx. 690 (9th Cir. 2005) (possession of less than half of a gram of cocaine); Hernandez v. Almeida, 146 Fed. Appx. 934 (9th Cir. 2005) (possession of 0.66 gram of cocaine); Rico v. Taylor, 146 Fed. Appx. 143 (9th Cir. 2005) (purse snatching); Webb v. McGrath, 146 Fed. Appx. 131 (9th Cir. 2005) (forgery); Nutt v. Knowles, 145 Fed. Appx. 221 (9th Cir. 2005) (50 years to life for two

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[4]This only includes those cases in which either the district court or the Ninth Circuit had granted a certificate of appealability. It does not include the numerous other cases with Eighth Amendment claims where the court concluded that not even a certificate of appealability was warranted.

counts of pandering); LaCroix v. Harris, 139 Fed. Appx. 866 (9th Cir. 2005) (shoplifting five cartons of cigarettes); Rodriguez v. Lewis, 132 Fed. Appx. 134 (9th Cir. 2005) (petty theft of two candy bars and package of cheese worth about $4); Crutcher v. Garcia, 131 Fed. Appx. 116 (9th Cir. 2005) (grand theft auto); Skinner v. Roe, 130 Fed. Appx. 909 (9th Cir. 2005) (225 years to life for multiple nonviolent theft-related offenses); Sigala v. Campbell, 130 Fed. Appx. 129 (9th Cir. 2005) (driving under the influence); Amico v. Alameida, 122 Fed. Appx. 357 (9th Cir. 2005) (multiple theft-related offenses); Nible v. Terhune, 119 Fed. Appx. 53 (9th Cir. 2004) (resisting a park ranger); Crawford v. Small, 116 Fed. Appx. 876 (9th Cir. 2004) (second degree burglary); Rios v. Garcia, 390 F.3d 1082 (9th Cir. 2004) (petty theft of two watches with combined value of $79.98); Jones v. Castro, 111 Fed. Appx. 942 (9th Cir. 2004) (escape without force or violence); Wrobleski v. Guirbino, 111 Fed. Appx. 934 (9th Cir. 2004) (petty theft with a prior); Alfred v. Galaza, 108 Fed. Appx. 554 (9th Cir. 2004) (reckless driving while evading a peace officer); Bonner v. Cambra, 105 Fed. Appx. 147 (9th Cir. 2004) (shoplifting tool set priced at $199.99 and car polisher priced at $59.99); Mason v. Hamlet, 94 Fed. Appx 575 (9th Cir. 2004) (95 years to life for two counts of first degree burglary and one count attempted first degree burglary); Guzman v. Adams, 88 Fed. Appx. 215 (9th Cir. 2004) (petty theft of Sony Walkman); Caliendo v. Warden of California Men's Colony, 353 F.3d 1147 (9th Cir.) (second degree auto burglary), opinion withdrawn and superseded on denial of rhrg., 365 F.3d 391 (2004) (granting relief on other grounds); Gonzales v. Terhune, 84 Fed. Appx. 931 (9th Cir. 2003) (residential burglary); Bryant v. Adams, 83 Fed. Appx. 260 (9th Cir. 2003) (shoplifting $24 worth of underwear), cert. denied, 541 U.S. 1017 (2004); Quinones v. Garcia, 83 Fed. Appx. 259 (9th Cir. 2003) (75 years to life for possession of heroin for sale and possession of firearm by felon); Butler v. Hernandez, 83

Fed. Appx. 219 (9th Cir. 2003) (petty theft with a prior); Duenas v. Galaza, 83 Fed. Appx. 180 (9th Cir. 2003) (shoplifting six bottles of beer); Clark v. Lamarque, 82 Fed. Appx. 522 (9th Cir. 2003) (indecent exposure); Anderson v. Lamarque, 81 Fed. Appx. 257 (9th Cir. 2003) (shoplifting $40 worth of clothing); Joseph v. Lewis, 81 Fed. Appx. 214 (9th Cir. 2003) (possessing $5 quantity of rock cocaine); Prince v. Adams, 80 Fed. Appx. 570 (9th Cir. 2003) (engaging in consensual sexual intercourse with 16 year old girlfriend); Reed v. Roe, 79 Fed. Appx. 991 (9th Cir. 2003) (failing to re-register as a sex offender after changing address); Huegerich v. Lamarque, 78 Fed. Appx. 610 (9th Cir. 2003); Barries v. Larson, 78 Fed. Appx. 7 (9th Cir. 2003) (grand theft); Pena v. Terhune, 77 Fed. Appx. 935 (9th Cir. 2003) (shoplifting wallet and pair of shoes with combined total value of $35.98); Clayton v. Fairman, 76 Fed. Appx. 186 (9th Cir. 2003) (burglary); Marshall v. Clark, 73 Fed. Appx. 975 (9th Cir. 2003) (shoplifting two bottles of liquor); Williams v. Galaza, 73 Fed. Appx. 941 (9th Cir. 2003) (shoplifting two pairs of jeans with total value between $60 and $64); Johnson v. Mueller, 73 Fed. Appx. 304 (9th Cir. 2003) (transportation of 0.16 gram of heroin); Clarke v. Galaza, 73 Fed. Appx. 296 (9th Cir. 2003) (driving under the influence and reckless driving); Allen v. Roe, 73 Fed. Appx. 291 (9th Cir. 2003) (shoplifting a telephone); LaCroix v. Harris, 73 Fed. Appx. 260 (9th Cir. 2003) (shoplifting two cartons of cigarettes); Webb v. Ylst, 72 Fed. Appx. 716 (9th Cir. 2003) (possession of 0.12 gram of methamphetamine); Varela v. Adams, 72 Fed. Appx. 698 (9th Cir. 2003) (narcotics possession); Smith v. Giurbino, 71 Fed. Appx. 684 (9th Cir. 2003) (possession of cocaine); Gayles-Shealy v. Adams, 71 Fed. Appx. 648 (9th Cir. 2003) (sale of $20 of cocaine base); Aguilar v. Ayers, 69 Fed. Appx. 390 (9th Cir. 2003) (unlawfully driving a vehicle, receiving stolen property, possession of a hypodermic needle); Wallace v. Mueller, 68

2003) (evading a police officer with reckless driving); Grayson v. Castro, 68 Fed. Appx. 794 (9th Cir. 2003) (50 years to life for receiving an access card without consent, forgery, second degree burglary); Blanton v. Terhune, 68 Fed. Appx. 119 (9th Cir. 2003) (possession of less than 0.1 gram of methamphetamine); Shirley v. Small, 68 Fed. Appx. 117 (9th Cir. 2003) (possession of 6.8 grams of cocaine for sale); Dodd v. Terhune, 68 Fed. Appx. 111 (9th Cir. 2003) (31 years to life for shoplifting two videotapes and a bottle of liquor); Morgan v. Rice, 68 Fed. Appx. 111 (9th Cir. 2003) (shoplifting a baseball glove); Gregory v. Ratelle, 68 Fed. Appx. 45 (9th Cir. 2003) (burglary of a vehicle and petty theft with a prior); Thomas v. Clarke, 68 Fed. Appx. 14 (9th Cir. 2003) (receiving stolen property [checks and a license plate]); Baxter v. Roe, 67 Fed. Appx. 493 (9th Cir. 2003) (shoplifting tools); King v. Clarke, 67 Fed. Appx. 460 (9th Cir. 2003) (shoplifting two cartons of cigarettes); Bailey v. Castro, 66 Fed. Appx. 103 (9th Cir. 2003) (commercial burglary); Cook v. Galaza, 65 Fed. Appx. 106 (9th Cir. 2003) (possession of 0.16 gram methamphetamine); Turner v. Candelaria, 64 Fed. Appx. 647 (9th Cir. 2003) (receiving stolen property); Rico v. Terhune, 63 Fed. Appx. 394 (9th Cir. 2003) (shoplifting a television set worth $130); Jones v. Taylor, 63 Fed. Appx. 330 (9th Cir. 2003) (shoplifting clothing); Walters v. Fairman, 62 Fed. Appx. 190 (9th Cir. 2003) (two counts of shoplifting [a shirt and a piece of software]); Samuel v. Lewis, 62 Fed. Appx. 190 (9th Cir. 2003) (50 years to life for two counts of petty theft with a prior); Robinson v. Lewis, 62 Fed. Appx. 188 (2003) (possession of 1.31 grams of cocaine base for sale); Aguirre v. Lewis, 62 Fed. Appx. 187 (9th Cir. 2003) (commercial burglary); Venson v. Lewis, 62 Fed. Appx. 186 (9th Cir. 2003) (vehicle code violations [unlawfully driving a vehicle and evading an officer]); Johnson v. Finn, 62 Fed. Appx. 185 (9th Cir. 2003) (35 years to life for residential burglary and petty theft with a prior); Benscoter v.

McGrath, 62 Fed. Appx. 184 (9th Cir. 2003) (shoplifting pair of tennis shoes); Tolbert v. Roe, 62 Fed. Appx. 184 (9th Cir. 2003) (50 years to life for two counts of second degree commercial burglary and two counts of petty theft with a prior); Andrews v. Lewis, 62 Fed. Appx. 183 (9th Cir. 2003) (shoplifting eight videotapes); Kunkle v. Galaza, 62 Fed. Appx. 182 (9th Cir. 2003) (evading an officer with reckless driving and possession of narcotics paraphernalia); Johnson v. Pliler, 62 Fed. Appx. 180 (9th Cir. 2003) (selling or furnishing 0.15 gram rock cocaine); Romero v. Galaza, 61 Fed. Appx. 492 (9th Cir. 2003) (receiving stolen property); Robles v. Clarke, 61 Fed. Appx. 483 (9th Cir. 2003) (shoplifting a $45 camera); Anderson v. Clarke, 61 Fed. Appx. 482 (9th Cir. 2003) (possession of 6.5 grams of methamphetamine for sale); Collins v. Pliler, 61 Fed. Appx. 479 (9th Cir. 2003) (shoplifting microwave oven worth $189); Le v. Castro, 61 Fed. Appx. 321 (9th Cir. 2003) (possession of $8 worth of narcotics [14 mg. cocaine and 97 mg. heroin]).[5] Given that the Ninth Circuit has granted relief on an Eighth Amendment claim in barely one percent of the California three strikes cases in which it has reviewed such claims in the last three years – and even the state acknowledged that the one case where relief was granted was an "exceedingly rare" case – it can hardly be reasonably argued that the Ninth Circuit is some renegade court gone amok requiring intervention by this Court.

Moreover, the state appears to be complaining that the Ninth Circuit has engaged in an analysis here that is contrary to this Court's decision in Andrade. (Pet. 8). It argues that the Ninth Circuit, by comparing the sentence imposed to the "gravity of the offense, considering both

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[5]The Ninth Circuit has also denied habeas relief from an Arizona three sentence since Andrade. See Kenyatta v. Stewart, 152 Fed. Appx. 616 (9th Cir. 2005) (aggravated assault with a truck). The court distinguished the case from the instant case on the ground that Mr. Reyes's triggering offense was nonviolent.

the nature of the triggering offense as well as the criminal history," has demonstrated "a fundamental misconception of" Andrade. (Pet. 8). But it is the state that misreads Andrade and this Court's precedents. The Ninth Circuit's post-Andrade analysis in Ramirez v. Castro is entirely appropriate.

In the context of a "three strikes" sentence, whether or not a particular case is the "exceedingly rare" case which violates the Eighth Amendment is entirely dependent on the facts in that case, *i.e.*, the nature and circumstances of both the triggering offense and the defendant's criminal history. To determine whether or not a defendant's crime and criminal history make the sentence imposed grossly disproportionate, it is necessary for a reviewing court to look at the facts surrounding each of the offenses involved. That is all the Ninth Circuit has said it needs to do in this case. And that is entirely consistent with this Court's Eighth Amendment jurisprudence.

For example, in Solem – a case that has not been overruled, and remains good law after Andrade – this Court explained that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." 463 U.S. at 292. In performing such objective analysis, this Court further endorsed consideration of "other accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society," such as the "absolute magnitude of the crime" and the offender's "culpability." Id. In Harmelin, Justice Kennedy's concurring opinion, which later guided the Court in its analyses in Ewing and Andrade, compared the nature and circumstances of the

offenses committed by the defendant there to other Eighth Amendment cases, particularly looking to whether an offense was "relatively minor" or "nonviolent." Harmelin, 501 U.S. at 1001, 1002. In Ewing, the plurality looked beyond the mere fact of conviction as part of its analysis, noting that Ewing's conduct in his prior strikes involved accosting a victim in the mail room of an apartment complex, claiming to have a gun before forcing the victim back to his apartment at knife-point to steal the victim's money and credit cards. 538 U.S. at 19. The plurality then "weigh[ed] the gravity of Ewing's offense," explaining that "we must place on the scales not only his current felony, but also his long history of felony recidivism." In Andrade, the Court looked beyond Andrade's most recent convictions to detail his extensive criminal history, and held that in light of that criminal history his sentence was not outside the "contours" of the proportionality principle and thus not an extraordinary case resulting in a sentence that violated the Eighth Amendment. 538 U.S. at 66-67, 76-77.[6] Looking to the nature and circumstance of a defendant's offenses is exactly what a reviewing habeas court must do. How else is the court to determine whether it is the exceedingly rare case where the sentence imposed was grossly disproportionate and whether any state court decision to the contrary was an unreasonable application of that clearly established principle?

The state complains that such an approach is improper, yet the state declined to seek review of the Ninth Circuit's decision which established that review process for Eighth

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[6]This Court has looked beyond the mere fact of conviction in other contexts as well. For example, in determining whether a prior conviction meets the requirements for a sentencing enhancement, this Court has recognized that some statutes may cover conduct which would not be subject to a sentence enhancement. Where it is unclear from the statute itself whether an enhancement was proper, this Court has permitted a modified approach where a court may look beyond the statute of conviction itself to other evidence which indicates the nature of the offense. See Taylor v. United States, 495 U.S. 575, 602 (1990).

Amendment claims post-Andrade. See Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004). But regardless of the process utilized, the state now seeks to have this Court declare in this case that no California prisoner serving a three strikes sentence can ever qualify for habeas relief of an Eighth Amendment claim – regardless of the facts and circumstances in the case. The state's argument is premised on the erroneous belief that *all* three strikes sentences in California are necessarily constitutional in light of Andrade. But such a holding would negate the entire line of cases starting with Weems v. United States, 217 U.S. 349, 371 (1910), which was applied to the states in Robinson v. California, 370 U.S. 660, 667 (1962) (applying Eighth Amendment to states via the Fourteenth Amendment), and which was *reaffirmed* in Andrade, which hold that any sentence which is grossly disproportionate *does* violate the Eighth Amendment's proscription on cruel and unusual punishment. The mere fact that California says a sentence satisfies the Eighth Amendment does not necessarily make it so. Prisoners have the right to challenge that *ipse dixit* in the federal courts, and in the exceedingly rare case, may have that sentence declared grossly disproportionate in violation of the Eighth Amendment.

To the extent the state seeks to have this Court overrule the "clearly established" gross disproportionality principle from Weems and Solem and Harmelin and Ewing and Andrade, this case is not the appropriate vehicle since *no habeas relief has yet been granted* and we won't know if the sentence imposed here was grossly disproportionate until the lower courts can review the facts surrounding Mr. Reyes's prior strikes. Accordingly, the writ should be denied on this issue.

II

**There is no need for this Court to review the claim that it violates 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth Amendment claim when he never attempted to develop those facts as part of such a challenge in state court because (1) the claim is premised on an assumption that Mr. Reyes did not attempt to develop facts underlying his prior convictions in state court, but the record supports no such premise, (2) by remanding the case to the district court for additional fact development and to determine whether relief should be granted in the first instance, the Ninth Circuit has done nothing that violates any statute or conflicts with any precedent, and (3) the proper forum for the state to litigate this claim is in the district court, not this Court.**

The state argues that the Ninth Circuit failed to adhere to the limits imposed by 28 U.S.C. § 2254(e)(2) when it remanded this case to the district court to develop the factual record as to the circumstances surrounding his prior strikes. (Pet. 11-13). It argues that the record fails to show that Mr. Reyes ever sought to develop these facts in any state court proceeding, and thus by remanding the case and ordering a hearing the Ninth Circuit's decision here conflicts with the express provisions of 28 U.S.C. §§ 2254(d)(2) and (e)(2), as well as this Court's decisions in Holland v. Jackson, 124 S. Ct. 2436, 2737-38 (2004), and Williams v. Taylor, 529 U.S. 420, 430, 432, 435 (2000). (Pet. 12). But the state's argument apparently is premised on a misreading of the record and/or a fundamental misunderstanding of § 2254(e)(2), the cases interpreting the statute, and habeas fact development in general. The Ninth Circuit's decision neither conflicts with this Court's precedents nor the statute itself.

As an initial matter, the state argues that the district court will be required to hold an evidentiary hearing. (Pet. 12). That is false. The Ninth Circuit only remanded "for the district court to develop the record further." (Pet. App. A13). If the court is able to develop the record

further without the need for an evidentiary hearing, it may do so. And that very well may be the case here. Although the state argues that "[t]he record fails to show . . . that Reyes ever sought to develop those facts [regarding the circumstances underlying his prior strikes] in any state court proceeding," (Pet. 12), that may, in fact, not be true, and in any event, would not in itself necessarily violate 28 U.S.C. § 2254(e)(2).

It is certainly true that the nature and circumstances of Mr. Reyes's prior strike convictions is unclear from the record before the Ninth Circuit; that is why the court remanded the case to the district court for further fact development. But the fact that the record before the Ninth Circuit is incomplete does not mean the facts and circumstances of those prior strike were not presented in any state court proceedings. Indeed, Mr. Reyes (through counsel) argued in his opening brief in the Ninth Circuit:

> The record on appeal presented to the California Court of Appeal, Fourth District, Division Two, the California Supreme Court, and the United States District Court relative to the petition for a writ of habeas corpus filed therein did not include Exhibits 5, 6, and 7 which, according to the exhibit description (SCT, P. 148; ER 10, p. 73), were the evidence relative to the priors alleged against appellant.

Reyes Ninth Cir. Opening Br., *available at* 2001 WL 34355185, at *22. Thus, the facts the state claims were not developed in any state court proceeding may in fact have been fully developed, and can found in portions of the record that were never submitted to the district court by the state when it lodged the state court proceedings. Of course, the only way to know for sure if for the district court to figure it out – just as the Ninth Circuit has said it must. The Supreme Court is not the appropriate forum to clear up the record. Accordingly, because the entire premise of the state's claim is an assumption about the record which may not exist, the issue is simply not

properly presented to this Court and review should be denied.

In any event, a habeas litigant's failure to develop the factual basis of a claim in state court does not in itself preclude an evidentiary hearing under 28 U.S.C. § 2254(e)(2). This Court has made clear that "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams, 529 U.S. at 432. It is only prisoners who are at fault for the deficiency in the state court record who would lose the right to an evidentiary hearing under § 2254(e)(2). Id. at 433. Thus,

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend . . . upon whether those efforts could have been successful.

Id. at 435.

At this point, because the issue has not been litigated in any lower court, we do not know whether Mr. Reyes lacked diligence in failing to develop the record – assuming, *arguendo*, that the record wasn't developed – and should now be barred from developing the facts surrounding his prior strikes. That is an issue which also should be for the district court to decide in the first instance, not this Court.

Finally, there is nothing in the Ninth Circuit's decision to remand for further factual development that is barred by any precedent. To the contrary, in Holland v. Jackson, 542 U.S. 649, 653 (2004), this Court criticized the Sixth Circuit for granting habeas relief by relying on

evidence apparently not developed in state court which neither the district court nor the Sixth Circuit had found either met the limitations of § 2254(e)(2) or was not subject to the statute because the petitioner had been diligent in pursuing the evidence. Here, by contrast, the Ninth Circuit has required the district court to look into that question. It has not, as the state appears to suggest, directed the district court to consider facts not previously developed in state court. It has merely required the district court to look into it in the first instance. And it is most appropriately in the district court – not this Court – where the state can argue the applicability of § 2254(e)(2) if it is found that the facts surrounding Mr. Reyes's prior robbery conviction were not developed before the state court.

In short, nothing the Ninth Circuit has done here violates the rules. And this Court is not in the habit of issuing advisory opinions or reviewing a case where the record is unclear. It is simply premature for this Court to weigh in at this time. Accordingly, the writ should be denied.

## CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Acting Federal Public Defender
Central District of California

DATED: May 15, 2006

JONATHAN D. LIBBY
Deputy Federal Public Defender
Central District of California
Counsel of Record

No. 05-755

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**IN THE SUPREME COURT OF THE UNITED STATES**

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S.W. ORNOSKI, Acting Warden,
*Petitioner,*

- v. -

SANTOS L. REYES,
*Respondent.*

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CERTIFICATE OF SERVICE

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I, Jonathan D. Libby, a member of the Bar of this Court, hereby certify pursuant to Sup. Ct. R. 29 that on this 15th day of May, 2006, a copy of Motion for Leave to Proceed in Forma Pauperis and Brief for Respondent in Opposition (to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit) were mailed, postage-prepaid, to:

Douglas P. Danzig, Deputy Attorney General, California Department of Justice, P.O. Box 85266, San Diego, California 92186-5266, Counsel of Record for Petitioner.

Respectfully submitted,

DATED: May 15, 2006

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No. 05-755

**IN THE SUPREME COURT OF THE UNITED STATES**

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S.W. ORNOSKI, Acting Warden, *Petitioner,*

v.

SANTOS L. REYES, *Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**IN THE SUPREME COURT OF THE UNITED STATES**

No. 05-755

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S.W. ORNOSKI, Acting Warden, *Petitioner,*

**v.**

SANTOS L. REYES, *Respondent.*

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Petitioner S. W. Ornoski, Acting Warden, submits this brief in reply to Respondent's Brief In Opposition to the Petition for Writ of Certiorari

**A. Certiorari Should Be Granted Because The Ninth Circuit's Published Opinion, Remanding The Case To The District Court For Further Development Of The Record, Clearly Conflicts With This Court's Relevant Jurisprudence And The Anti-Terrorism And Effective Death Penalty Act (AEDPA)**

1. Reyes contends there is no need for this Court to review the first question presented in this case. Opp. at 7. In support of his contention, Reyes argues that Petitioner has read something into this Court's decision in *Lockyer v. Andrade*, 538 U.S. (2003) that is not there, i.e., that *Andrade* implicitly held that a federal habeas court cannot find a state court ruling upholding an Eighth Amendment challenge to a properly imposed Three Strikes sentence contrary to, or an unreasonable application of, this Court's clearly established precedent. Opp. at 7-8. He argues that this is so for two reasons. First, he notes

that in *Andrade*, this Court acknowledged that the gross disproportionality principle remains applicable in the exceedingly rare and extreme case. Therefore, he claims, even a Three Strikes sentence could be grossly disproportionate, and thus a state court's contrary conclusion might be an objectively unreasonable application of this Court's clearly established law. Opp. at 8. Second, he notes that in *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), this Court held that a state court decision is contrary to clearly established precedent if it confronts a set of facts materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from this Court's precedent. Therefore, he claims, if a Three Strikes case involved facts materially indistinguishable from *Solem v. Helm*, 463 U.S. 277 (1983), and a state court decision found the sentence not grossly disproportionate, the state's decision could be set aside under 28 U.S.C. § 2254(d)(1). Opp. at 8-9.

Reyes misses the point with both arguments. First, while he is correct in his assertion that *Andrade* held a gross disproportionality principle applies in an exceedingly rare and extreme case, *Andrade* itself dealt with virtually the most exceedingly rare and extreme case California could present under its Three Strikes law, i.e., two consecutive sentences of twenty-five years to life with relatively minor triggering offenses. Nevertheless, this Court held that the state court's merits decision was neither contrary to, nor did it involve an unreasonable application of, the gross disproportionality principle. *Andrade*, 538 U.S. at 73-74. Accordingly, the implicit holding in *Andrade* was, as Petitioner argued in the petition for writ of certiorari, that no properly imposed Three Strikes sentence could violate the principle, regardless of whether the state chooses to seek further review in a particular case or not. *See* Opp. at 9-10 (citing the California Attorney General's statement as to why the State declined to seek further

review of the Ninth Circuit's decision in *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004) (*Ramirez*-I).[1/]

Second, it would be impossible for a Three Strikes case to be materially indistinguishable from *Solem*. As this Court has explained, the facts in *Andrade* were not materially indistinguishable from the facts in *Solem*, if for no other reason than that *Solem* involved a life sentence with no possibility of parole, whereas Andrade retained the possibility of parole, albeit in practical terms he might never realize that possibility. *Andrade* 538 U.S. at 74. In other words, California's three-strikes law, even in its harshest form, provides for the possibility of parole, and therefore a sentence imposed under the law could never be materially indistinguishable from *Solem*.

2. Reyes argues granting certiorari is not warranted in this case because the Ninth Circuit has not granted habeas relief in this case, and may never do so. Opp. at 9. Noting Petitioner's arguments for why this case warrants review by this Court - that the Ninth Circuit's recent decisions confirm that the court continues to misunderstand the scope of federal habeas review, that the Ninth Circuit has failed to be guided by this Court's recent decisions concerning habeas review of Eighth Amendment challenges, and that the Ninth Circuit's decision in

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1. As to Reyes's reference to the State's decision not to seek further review in *Ramirez*-I, he seems to be implying that because the State did not seek further review it endorsed the legal reasoning in the opinion. Reyes is incorrect. The question of whether to seek further review of a lower court decision necessarily involves a discretionary policy decision. Although that decision may include an assessment of the legal reasoning in an opinion, it also inherently concerns a number of other factors unrelated to whether the opinion was legally sound or not. Stated another way, a decision to not seek further review no more suggests an endorsement of the underlying legal reasoning than this Court' denial of a petition for writ of certiorari suggests an endorsement of an underlying decision. Accordingly, nothing about the State's decision to not seek further review in *Ramirez*-I has anything to do with the question presented to this Court, i.e., whether federal habeas relief can be granted on Eighth Amendment grounds for any properly imposed Three-Strikes sentence.

this case will lead to inconsistent outcomes dependent on how panels choose to parse facts - Reyes argues that the inchoate nature of the remedy underlying the Ninth Circuit's opinion belies Petitioner's rhetoric, reveals Petitioner's argument is misleading, and fails to give the entire picture. Opp. at 9.

Reyes fails to comprehend the critical feature of the opinion, however. Although the ultimate disposition of this case has not yet been determined, the Ninth Circuit published its opinion. There can be no reason for publishing a decision remanding this case to develop the specific facts concerning a prior conviction, rather than accepting the State's definition of the crime, other than to establish a vehicle for dismantling *Andrade*. This is evidenced by the fact that, not long after ordering the opinion published the Ninth Circuit cited it as authority for ordering the same sort of record development in another case, i.e., *Ramirez v. Terhune*, 128 Fed. Appx. 663 (2004) (*Ramirez*-II), which is also the subject of a petition for writ of certiorari currently pending in this Court (docket number 05-736). This procedural history cannot be ignored. As the dissent in this case pointed out, some judges on the Ninth Circuit chafe at this Court's decisions in *Ewing v. California*, 538 U.S. 11 (2003), and *Andrade*. *See Reyes v. Brown*, 399 F.3d 964, 971 (9th Cir. 2005) (Tallman, J., dissenting).

Thus, the history in this case strongly suggests that if the Ninth Circuit's opinion is left intact, the fundamental role of a habeas court under the AEDPA, i.e., to determine whether the state court's merits decision was contrary to, or involved an unreasonable application of, this Court's controlling precedent, may be subjugated to a panel's subjective opinion as to what sort of sentence is justified. Such a notion is inconsistent with this Court's recent habeas jurisprudence. *See Harmelin v. Michigan*, 501 U.S. 957 (1991) (proportionality review by federal courts should be informed, to the maximum possible extent, by objective factors) (Kennedy, J., concurring); *Andrade*, 538 U.S. at 76 (the proportionality principle, whose precise

contours are unclear, gives legislatures broad discretion to fashion a sentence).

3. Reyes further argues that certiorari should not be granted because, relying on *Andrade*, the Ninth Circuit has consistently denied habeas relief to Three Strikes prisoners, even where the triggering offense was minor. Opp. at 10. In support of his contention Reyes cites numerous cases where the Ninth Circuit denied habeas relief. Opp. at 10-14. Therefore, he maintains, it cannot be reasonably argued that the Ninth Circuit is a "renegade court gone amok," such that this Court's intervention is required. Opp. at 14.

Preliminarily, Petitioner submits that Reyes's rhetoric is unwarranted and inaccurate. Petitioner has never suggested that the Ninth Circuit is a renegade court gone amok. To the contrary, Petitioner recognizes that the judges of the Ninth Circuit apply the law conscientiously, as they understand it. Nor does Petitioner dispute the notion that in large part the Ninth Circuit has reached the correct result in cases seemingly controlled by *Andrade*. Nevertheless, it is also apparent that some panels of the court appear to misunderstand this Court's recent habeas jurisprudence. And as a result, they appear to want to act in equity rather than as a habeas court.

In any event, Petitioner draws a different conclusion than the one Reyes draws from the Ninth Circuit's denial of habeas relief in numerous Three Strikes cases involving minor triggering offenses. A federal court may grant a certificate of appealability in a habeas case involving a state prisoner upon a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). This standard requires a "showing that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 and n. 4). Thus, the fact that the Ninth Circuit and the district courts within its jurisdiction have granted certificates of appealability in over eighty cases means

that, in a significant number of Three Strikes cases the federal courts have concluded that the question of whether the State correctly applied this Court's Eighth Amendment jurisprudence is debatable among reasonable jurists. Surely, that was not the State's understanding of the implications of this Court's decision in *Andrade*. Stated another way, the sheer volume of grants of certificates of appealability suggests that a significant portion of the Ninth Circuit and the district courts within the circuit still do not understand the limitations this Court placed on federal habeas courts when they review the decisions of California Courts in Three Strikes cases involving Eighth Amendment claims. Accordingly, certiorari is warranted.

4. Citing *Solem's* three-part proportionality test, Reyes argues granting certiorari is not warranted in this case because this Court has endorsed the idea that, in conducting a proportionality analysis under the Eighth Amendment, courts may use other accepted principles in measuring the harm caused or threatened to the victim or society. Citing *Ewing* and *Harmelin*, he argues that looking to the nature and circumstances of a defendant's offenses is exactly what a habeas court must do, because otherwise a habeas court cannot determine whether it is the exceedingly rare case where the sentence was grossly disproportionate and a state court decision to the contrary was an unreasonable application of that principle. Opp. at 15-16.

Once again, Reyes misses the point. *Solem* was a pre-AEDPA case. Thus, it did not limit a federal habeas court to deciding whether a state court's determination of a term-of-years sentence was objectively unreasonable or not. In addition, the continued validity of *Solem* is questionable in that in *Harmelin* five justices disapproved the three-part test. Thus, *Solem* has limited application in addressing the question presented in this case. Besides, neither *Ewing* nor *Harmelin* involved habeas review. Moreover, as argued in the petition for writ of certiorari in this case, this Court's decision in *Ewing* has little, if any, precedential value regarding federal habeas review. It was a plurality decision of three Justices, with two other

Justices joining only the judgment, one on the grounds that the Eighth Amendment contains no proportionality principle, and the other on the grounds that any proportionality principle contained in the Eighth Amendment applies only to modes of punishment. Thus, the only rule of law that can be distilled from *Ewing* is that, in California, a sentence of twenty-five years to life for a Three Strikes recidivist who commits grand theft does not violate the Eighth Amendment. Why it does not violate the Eighth Amendment is still subject to debate.

The point is that, in *Andrade* this Court acknowledged that the Court has not provided any clearly-established precedent - at least none that is particularly useful - regarding how to apply the vague gross disproportionality principle to California's Three Strikes law. That is why the Court limited application of the principle to the exceedingly rare and extreme case. Petitioner construes the Court's holding to mean that the principle applies to a sentence that is so extreme that no one would dispute that it is disproportionate. The principle certainly does not apply to recidivist sentencing schemes such as California's Three Strikes law. Accordingly this Court's intervention in this case is warranted.

5. Reyes argues that this Court should not grant a writ of certiorari in this case because, when a statute is unclear regarding whether an enhancement is proper this Court has permitted a court to look beyond the statute of conviction to other evidence indicating the nature of the offense. Opp. at 16 n. 6. But California's three-strikes law is not an enhancement; it is an alternative sentencing scheme for certain specified recidivists. Thus, Reyes's point is irrelevant. Moreover, California's three-strikes law is absolute. And, in this case, it flatly requires a sentence of twenty-five year to life because Reyes has previously been convicted of two enumerated serious or violent felonies. Thus, there is no ambiguity in the statute in question here.

6. Reyes further claims this Court should deny the petition for writ of certiorari in this case because Petitioner seeks to have

this Court declare that no California prisoner serving a three-strikes sentence can ever qualify for habeas relief on an Eighth Amendment claim, regardless of the facts and circumstances in the case. Opp. at 17. Reyes's contention is a distortion of Petitioner's request. The notion underlying Petitioner's argument is that no properly imposed three-strikes sentence could qualify for habeas relief on Eighth Amendment grounds until such time as this Court provides greater clarity regarding what factors may indicate gross disproportionality. *See Andrade, 538 U.S.* at 72 (our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality). Until that occurs, federal habeas review should be far more limited than is apparent in this case.

7. Finally, Reyes maintains certiorari should not be granted in this case because the State is seeking to have this Court overrule an entire line of cases, including *Weems v. United States*, 217 U.S. 349 (1910), *Solem v. Helm*, *Harmelin v. Michigan*, *Ewing v. California*, and *Lockyer v. Andrade*. Opp. at 17. Reyes's contention reflects a persistent misunderstanding of the relationship between this Court's Eighth Amendment jurisprudence and its habeas jurisprudence.

*Weems*, *Solem*, *Harmelin*, and *Ewing* are all cases in which this Court directly addressed the question of whether a term-of-years sentence violated the Eighth Amendment. The instant matter, however, involves a federal court sitting in habeas review of a state court decision. Thus, the analysis shifts from the question of whether the sentence violates the Eighth Amendment to whether there are any clearly established principles concerning the Eight Amendment's application to terms-of-years sentences, and if so, whether the state court's decision was contrary to, or involved an unreasonable application of, those principles. As this Court has implicitly acknowledged, however, the only clearly established principle addressing this question is so vague that it cannot be usefully applied. Thus, if this Court were to hold as Petitioner has requested, it would not negate any of this Court's pure Eighth

Amendment jurisprudence, whatsoever. It would simply make explicit what has previously been implicit, i.e., that given the current state of this Court's Eighth Amendment jurisprudence and the current state of California's Three Strikes law, no sentence properly imposed under the state statute, which had been upheld on state appeal or habeas corpus, could be contrary to, or involve an objectively unreasonable application of, controlling precedent.

**B. Certiorari Should Be Granted Because The Ninth Circuit's Published Opinion, Remanding This Case To The District Court For Further Development Of The Record, Fails To Adhere to The Express Limitations Congress Imposed Through The AEDPA And Conflicts With This Court's Relevant Precedent**

1. Reyes argues that a writ of certiorari should not be granted as to the second question presented in this case because the Ninth Circuit "only remanded 'for the district court to develop the record further,'" and therefore Petitioner's assertion, that the district court will be required to hold an evidentiary hearing, is incorrect. Opp. at 18-19. In support of his argument, Reyes cites his opening brief in the Ninth Circuit, where his attorney noted that the state appellate record did not include Exhibits 5, 6, and 7, which constituted the evidence relative to Reyes's prior convictions. Reyes then argues that an evidentiary hearing may be unnecessary because the evidence may have already been developed, and that said evidence could be found in portions of the record never submitted to the district court by the state when it lodged records of the state court proceedings. Opp. at 19-20.

Reyes's assertion, that the district court will not necessarily have to hold an evidentiary hearing, is incorrect for two reasons. First, his opening brief also noted that his attorney had contacted the clerk in the Exhibits Section of the San Bernardino County Superior Court, who informed counsel that

all the exhibits in the case were destroyed in December 2000. Reyes's Ninth Cir. Opening Brief, *available at* 2001 WL 34355185, at 22 n. 5. Consequently, the exhibits were not available for the State to lodge with the district court, nor are they available now. Second, the Exhibits List from the state court proceedings reveals the referenced exhibits were certified copies of Reyes's prior convictions.[2/] Certified copies of prior convictions do not contain any facts concerning the circumstances of the offenses; they merely reflect the conviction, the statute violated, and the dates the defendant served in prison.

Thus, there is simply no way that the district court will be able to develop the record regarding the circumstances underlying Reyes's prior strike without holding an evidentiary hearing. As pertinent here, 28 U.S.C. § 2254(e)(2) precludes a habeas court from holding an evidentiary hearing where the applicant failed to develop the factual basis for his claim in state court, unless the applicant can show that the factual basis could not have been previously discovered by exercising due diligence. Here, the Ninth Circuit has fashioned a remedy that fails to adhere to the limitations imposed by § 2254(e)(2). Accordingly, a writ of certiorari should be granted.

2. Reyes argues the petition for writ of certiorari should be denied as to the second question presented in this case because nothing about the Ninth Circuit's decision to remand the matter for further factual development is barred by precedent. Opp. at 20. In support of his argument, Reyes claims the Ninth Circuit

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2. The exhibits were certified copies of Reyes's prior convictions, which are commonly known in California as Penal Code § 969b packets. California Penal Code § 969b provides, in relevant part, that if certified by the official custodian, copies of records of any state penitentiary, reformatory, county jail city jail, or federal penitentiary in which the defendant has been imprisoned, may be introduced for the purpose of establishing prima facie evidence that the defendant has been convicted of an act punishable by imprisonment and has served a term therefor in a penal institution.

has merely required the district court to look into the questions of: (1) whether the evidence concerning the circumstances of Reyes's prior conviction was developed in state court; and (2) whether Reyes met an exception to 28 U.S.C. § 2254(e)(2)'s limitations on evidentiary hearing in the habeas court.

Reyes is incorrect. There is no precedent for a habeas court to engage in this sort of expedition. No decision of this Court has remotely suggested that federal habeas courts can look beyond the state's definition of a crime, to the circumstances of its commission, to evaluate the seriousness of prior convictions, when the applicant failed to develop the facts in state court. Contrary to the Ninth Circuit's suggestion, nothing in *Solem* so held. More to the point, § 2254(e)(2) expressly forbids it. Thus, the Ninth Circuit's decision in this case conflicts with this Court's precedent, as well as the controlling statute. Accordingly, a writ of certiorari should be granted.